A

Affin Bank Bhd v Tes Steel Products Sdn Bhd & Ors

B HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-159–04 OF 2016
MOHD NAZLAN JC
27 OCTOBER 2016

C *Civil Procedure — Summary judgment — Action to recover monies loaned — Plaintiff granted credit facilities to defendants — Defendants default in payment — Whether plaintiff should first enforce charges instead of pursuing claim against defendants — Whether action against second, third, fourth and fifth defendants premature — Whether plaintiff wrongly demanded payment of two different amounts — Whether there were triable issues — Rules of Court 2012 O 2 r 3 & O 14*

D

The plaintiff had granted to the first defendant credit facilities under a facilities agreement ('the facilities agreement') which amounted in aggregate to RM700,000. As part of security arrangement under the facilities agreement, three third party legal charges were registered in respect of three industrial plants situated at lands held under three separate documents of titles respectively ('the charged properties'). It must be noted that the second, third, fourth and fifth defendants had each individually executed a joint and several guarantee for the repayment of the facilities under the facilities agreement ('the guarantee'). Upon default in payment by the first defendant, the plaintiff issued a letter of demand for the amount of RM736,971.82 being the outstanding amount as at 14 January 2016. As there was no respond by the first defendant, the plaintiff had subsequently issued another demand letter through its solicitor for the outstanding amount of RM756,047.02 as at 31 March 2016. In default of payment of the outstanding sum by the defendants, the plaintiff had brought the present action for summary judgment ('encl 5') under O 14 of the Rules of Court 2012 ('the ROC') against the defendants. The plaintiff had also raised a preliminary objection to the late filing and service of the affidavit in reply on behalf of the defendants under O 14 r 2(4) of the ROC. The defendants had raised three issues in opposing encl 5, which were: (a) the plaintiff should first enforce the charges instead of pursuing a claim against the defendants ('the first issue'); (b) the action against the second, third, fourth and fifth defendants was premature ('the second issue'); and (c) the plaintiff wrongly demanded payment of two different amounts ('the third issue').

E

F

G

H

I

Held, allowing encl 5 with costs:

(1) With regards to the preliminary objection, the court was fully entitled to reject the late service of the affidavit in reply which was not explained at all, let alone satisfactorily. Nevertheless, the court decided to hear the application given the summary nature of the proceedings. In relation to this, O 2 r 3 of the ROC could be invoked as the plaintiff was not prejudiced by the delay nor was there any substantial miscarriage of justice that could not be cured by an appropriate order for costs (see paras 9–11).

(2) The position in law is trite. Given that there was no restriction in any contractual arrangement between the parties, the plaintiff was therefore fully entitled to exercise its right to pursue its claim against the borrower/first defendant (and the other defendants as guarantors) prior to seeking to foreclose the charged properties. Thus, the first issue was entirely unsustainable and could not in any manner be construed as giving rise to a triable issue (see para 23).

(3) The second issue was clearly unmeritorious as it was crystal clearly stated in the guarantee itself that the plaintiff had the right to pursue its recovery against the defendants as guarantors. More pertinently, the guarantors were deemed by section 2.03 of the guarantee as principal debtors which further made the ability of the plaintiff to take action against the second, third, fourth and fifth defendants, as guarantors, to be more manifest. This was also consistent with the rule that a creditor has the right to commence bankruptcy proceedings against the guarantors separately or simultaneously with its enforcement of other security arrangement. It was not for the defendants to dictate which remedy the creditor should pursue first. Accordingly, the second issue raised by the defendants was clearly misconceived and thus could not validly constitute a triable issue (see paras 25–27 & 29).

(4) There was no ambiguity as the different amounts plainly referred to the amount outstanding as computed by reference to a particular date. Further, the matter was put to rest when the plaintiff issued the certificate of indebtedness ('COD') to the first defendant repeating the outstanding amount of RM756,047.02 as at 31 March 2016. None of the defendants was able to demonstrate any manifest error in the COD. Neither could any of the defendants proffer any justifications that could disprove the conclusive nature of the same. The third issue was thus entirely unsustainable, devoid of merit and did not raised any triable issue (see paras 30–31 & 34).

(5) The case of the defendants was riddled with averments which were not substantiated. These were bare averments without real support. No documents were produced by the first defendant to corroborate its stance on virtually all the arguments to challenge encl 5. It is trite that mere bare denials or assertions do not constitute evidence and cannot give rise to

triable issues. In totality, the defendants had fallen very considerably short, and not succeeded, on a balance of probabilities, in demonstrating that they had any triable issue to resist encl 5 (see paras 36 & 39).

[Bahasa Malaysia summary

Pihak plaintif telah memberikan kepada defendan pertama kemudahan kredit di bawah suatu perjanjian kemudahan ('perjanjian kemudahan') yang terjumlah secara agregatnya kepada RM700,000. Sebagai sebahagian daripada perkiraan cagaran di bawah perjanjian kemudahan, tiga gadaian undang-undang pihak ketiga telah didaftarkan berkaitan dengan tiga loji perindustrian yang berada pada tanah yang dipegang di bawah tiga dokumen hakmilik masing-masing ('harta gadaian'). Perlu diambil kira bahawa defendan kedua, ketiga, keempat dan kelima telah masing-masing menyempurnakan jaminan bersesama dan berasingan bagi pembayaran balik kemudahan di bawah perjanjian kemudahan ('jaminan'). Apabila defendan pertama mungkir dalam pembayaran, pihak plaintif telah mengeluarkan suatu surat tuntutan bagi amaun RM736,971.82 yang merupakan amaun tertunggak setakat 14 Januari 2016. Oleh sebab tiada jawapan daripada defendan pertama, pihak plaintif kemudiannya telah mengeluarkan lagi satu surat tuntutan melalui peguam caranya bagi amaun tertunggak berjumlah RM756,047.02 setakat 31 Mac 2016. Oleh sebab kemungkiran defendan membayar jumlah tertunggak itu, pihak plaintif telah memulakan tindakan ini untuk suatu penghakiman terus ('lampiran 5') di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM') terhadap defendan. Pihak plaintif telah membangkitkan suatu bantahan awal atas kelewatan pemfailan dan penyerahan afidavit jawapan bagi pihak defendan di bawah A 14 k 2(4) KKM. Pihak defendan telah membangkitkan tiga isu untuk menentang lampiran 5, iaitu: (a) pihak plaintif sewajarnya menguatkuasakan gadaian terlebih dahulu dan bukan membuat tuntutan terhadap defendan ('isu pertama'); (b) tindakan terhadap defendan kedua, ketiga, keempat dan kelima adalah pramatang ('isu kedua'); dan (c) pihak plaintif telah membuat tuntutan salah apabila menuntut pembayaran dua amaun yang berbeza ('isu ketiga').

Diputuskan, membenarkan lampiran 5 dengan kos:

(1) Berkenaan dengan bantahan awal, mahkamah berhak untuk menolak penyerahan lewat afidavit jawapan yang tidak dijelaskan langsung, apatah lagi memuaskan. Namun begitu, mahkamah telah memutuskan untuk mendengar permohonan yang dibuat dengan mengambil kira jenis prosiding terus bagi permohonan ini. Berhubungan dengan ini, A 2 k 3 KKM boleh digunakan memandangkan plaintif tidak diprejudiskan oleh kelewatan dan tidak terdapat salah laksana keadilan yang substantif yang tidak boleh dibetulkan dengan memberi suatu perintah mengenai kos (lihat perenggan 9–11).

(2) Kedudukan undang-undang adalah mantap. Memandangkan tidak

terdapat halangan dalam mana-mana perkiraan antara pihak-pihak, maka pihak plaintif berhak sepenuhnya untuk melaksanakan haknya untuk membuat tuntutan terhadap peminjam/defendan pertama (dan defendan lain sebagai penjamin) sebelum membuat tuntutan untuk menghalangtebus harta gadaian itu. Oleh itu, isu pertama tidak dapat dipertahankan sepenuhnya dan tidak boleh dalam apa-apa keadaan dikatakan sebagai menimbulkan isu yang boleh dibicarakan (lihat perenggan 23).

(3) Isu kedua adalah jelas tidak mempunyai merit memandangkan telah dinyatakan dengan jelas dalam jaminan itu sendiri bahawa plaintif mempunyai hak untuk membuat pembayaran balik terhadap defendan sebagai penjamin. Lebih penting ialah pihak penjamin adalah dianggap di bawah seksyen 2.03 jaminan sebagai penghutang utama yang selanjutnya membuatkan keupayaan plaintif untuk mengambil tindakan terhadap defendan kedua, ketiga, keempat dan kelima, sebagai penjamin, lebih nyata. Ini juga selaras dengan kaedah bahawa seorang pemiutang mempunyai hak untuk memulakan prosiding kebankrapan terhadap penjamin secara berasingan atau serentak dengan penguatkuasaan perkiraan cagaran yang lain. Ia bukanlah terletak kepada defendan untuk menentukan remedi yang mana pemiutang patut mulakan dahulu. Oleh yang demikian, isu kedua yang dibangkitkan oleh defendan adalah dengan jelas mengelirukan dan oleh itu tidak boleh dijadikan sebagai isu yang boleh dibicarakan (lihat perenggan 25–27 & 29).

(4) Tidak terdapat ketaksaan kerana amaun yang berlainan itu dengan jelasnya merujuk kepada amaun tertunggak yang dikira dengan merujuk kepada suatu tarikh yang tertentu. Selain itu, perkara ini telah selesai apabila pihak plaintif mengeluarkan perakuan keberhutangan ('PK') kepada defendan pertama yang mengulangi amaun tertunggak sebanyak RM756,047.02 setakat 31 Mac 2016. Mana-mana defendan tidak dapat menunjukkan mana-mana kesalahan yang nyata dalam PK itu. Mana-mana defendan juga tidak dapat memberikan justifikasi yang boleh menafikan keadaan konklusif dalam PK itu. Oleh itu, isu ketiga tidak dapat dipertahankan, tidak mempunyai merit dan tidak menimbulkan apa-apa isu yang boleh dibicarakan (lihat perenggan 30–31 & 34).

(5) Kes pihak defendan penuh dengan penyataan yang tidak disokong. Ini hanyalah penyataan biasa tanpa apa-apa sokongan. Tiada dokumen yang dikemukakan oleh defendan pertama untuk menyokong penyataannya berkenaan dengan kesemua hujahan untuk mencabar lampiran 5. Ia adalah suatu yang mantap bahawa penafian atau tuduhan semata-mata tidak terjumlah sebagai suatu keterangan dan tidak boleh menimbulkan isu yang boleh dibicarakan. Secara keseluruhannya, pihak defendan telah gagal, atas imbangan yang munasabah, untuk menunjukkan bahawa

mereka mempunyai apa-apa isu yang boleh dibicarakan untuk menolak lampiran 5 (lihat perenggan 36 & 39).]

Notes

For cases on action to recover monies loaned, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9096–9101.

Cases referred to

Bank Bumiputra Malaysia Bhd v Esah binti Abdul Ghani [1986] 1 MLJ 16; [1985] CLJ Rep 41, SC (refd)
Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)
Bank Simpanan Nasional v Tham Lai Ling [2016] 6 CLJ 880, HC (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685, FC (refd)
Chan Boi Loi v Public Bank Bhd and another application [2011] 1 MLJ 478; [2009] 6 CLJ 81, FC (refd)
Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd [1995] 2 MLJ 363, CA (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77; [1997] 2 CLJ 36, SC (refd)
National Company for Foreign Trade v Kayu Raya Sdn Bhd [1984] 2 MLJ 300, FC (folld)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA (refd)
Tan Kong Min v Malaysian National Insurance Sdn Bhd [2006] 1 MLJ 601; [2005] 3 CLJ 825, FC (consd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)

Legislation referred to

Limitation Act 1953 s 21
Rules of Court 2012 O 2 r 3, O 14, O 14 rr 2(4), 3

Al Muazzin (Azam Lim & Pang) for the plaintiff.
Justin Ng (Chai & Partners) for the defendants.

Mohd Nazlan JC:

INTRODUCTION

[1] This case concerns an application by the plaintiff for summary judgment against the defendants, as documented in encl 5. I allowed the same at the conclusion of the hearing. This judgment contains the full reasons for my decision.

KEY BACKGROUND FACTS

[2] In pursuance of a letter of offer dated 13 July 2007 issued by Affin Bank Bhd ('the plaintiff') and duly accepted on 19 July 2007 by Tes Steel Products Sdn Bhd ('the first defendant'), the plaintiff granted to the first defendant, credit facilities which amounted in aggregate to RM700,000; comprising an overdraft facility with a limit of RM200,000 and letter of credit and trust receipt facilities for RM500,000.

[3] At the further request of the first defendant, a variation in the form of additional terms concerning the security arrangement governing the credit facilities had been effected by way of a variation letter dated 16 October 2007, and accepted by the first defendant on 29 October 2007. A facilities agreement was executed on 13 February 2009 to document the terms and conditions of the facilities granted to the first defendant. The pertinent terms for the purpose of this judgment will be set out at the appropriate juncture hereinafter.

[4] As part of the security arrangement under the facilities agreement, two third party legal charges were registered on 17 February 2009 and one other third party legal charge was registered on 19 February 2009. These three charges were in respect of three industrial plants situated at lands held under three separate documents of titles, respectively ('the charged properties'). The charged properties are registered in the name of one Kaharudin bin Mo Min, the third party chargor. In addition, the second, third, fourth and fifth defendants had each individually executed a joint and several guarantee for the repayment of the facilities under the facilities agreement ('the guarantee').

[5] Given the failure of the first defendant to adhere to its repayment obligations under the overdraft facility, and keep its overdraft account regular in breach of the facilities agreement, the plaintiff issued a letter dated 15 January 2016 to all the defendants, recalling the overdraft facility, and demanding payment of RM736,971.82, being the outstanding amount as at 14 January 2016, together with interest thereon at 3.50%pa plus BLR, within seven days. Absent any satisfaction by the defendants, the plaintiff, through its solicitors sent demand letters dated 4 April 2016 addressed to each and every one of the defendants, recalling the overdraft facility and demanding, within seven days, the payment to the plaintiff the outstanding amount of RM756,047.02 as at 31 March 2016; but this too went unheeded.

[6] As such, this then resulted in the filing of a writ action by the plaintiff and this instant application for summary judgment against the defendants.

PRELIMINARY OBJECTION

[7] The plaintiff had also raised a preliminary objection to the late filing and service of the affidavit in reply on behalf of the defendants which was only affirmed on 28 June 2016, where the final date of the requisite 14 day period under O 14 r 2(4) of the Rules of Court 2012 for the reply ought to have been on 20 June 2016 (given service of the application and supporting affidavit on 6 June 2016).

[8] Yet the affidavit in reply was only served on the solicitors for the plaintiff on 11 July 2016 vide a letter of the defendants' solicitors dated 30 June 2016. There was no leave of court or agreement by the plaintiff to justify the delay of almost three weeks. The plaintiff now asks that the affidavit in reply be rejected and requested for judgment be entered on the authority of *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 since the affidavit of the plaintiff is said not to have been responded to at all, and thus deemed admitted.

[9] I agree that I am fully entitled to reject the late service of the affidavit in reply by the defendants which was not explained at all, let alone satisfactorily. This reeks of a blatant non-compliance with the Rules of Court which should not be tolerated.

[10] Nevertheless, I decided to hear the application given the summary nature of the proceedings and thus considered the arguments of the defendants in their opposition to the summary judgment application.

[11] In my view O 2 r 3 could be invoked for the plaintiff is not prejudiced by the delay nor is there any substantial miscarriage of justice that cannot be cured by an appropriate order for costs.

EVALUATION AND FINDING OF THIS COURT

The law

[12] This is an application for summary judgment under O 14 of the Rules of Court 2012 ('the RC 2012'). It is well-established and already settled law that once an O 14 application is shown to have been correctly and properly filed, the burden shifts and thus rests on the defendant who desires to resist the application to raise a defence which shows a 'bona fide triable issue', in the sense of an issue which justifies and warrants the matter to be considered at the trial proper.

[13] This is entirely in keeping with the requirements of O 14 r 3 of the RC

2012 which provides that unless the defendant satisfies the court with respect to the claim, or part of a claim, to which the application relates that:

(a) there is an issue or question in dispute which ought to be tried: or

(b) there ought for some other reason to be a trial of that claim or part,

the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relied claimed.

[14] As such, in the often quoted decision of the former Supreme Court in *National Company for Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 it was authoritatively ruled as follows:

> We think it appropriate to remind ourselves once again that in every application under O 14 the first considerations are (1) whether the case comes within the Order and (b) whether the plaintiff has satisfied the preliminary requirements for proceeding under O 14. For the purposes of an application under O 14 the preliminary requirements are:
>
> (i) the defendant must have entered an appearance;
>
> (ii) the statement of claim must have been served on the defendant; and
>
> (iii) the affidavit in support of the application must comply with the requirements of r 2 of the O 14.
>
> ... If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed. If however, these considerations are satisfied, the plaintiff will have established a prima facie case and he becomes entitled to judgment. The burden then shifts to the defendant to satisfy the court why judgment should not be given against him.

[15] As the plaintiff has satisfied these preliminary requirements, and this is not disputed by the defendants, the burden is now firmly on the defendants to show that there is a triable issue that does not justify summary judgment be entered against them. If the defendants can demonstrate even one triable issue, this court will not grant summary judgment. But it has to be a genuinely triable issue. As made clear by the Federal Court in *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241, it is not enough for a defendant to raise an issue or any issue. The defendant must instead raise such an issue as would require a trial in order to determine it.

The issues raised by the defendant

[16] I shall next consider each of the issues raised by the defendants in the affidavits affirmed by the second defendant on behalf of all the defendants, and as repeated in the written submissions and highlighted in the oral submissions at the hearing, in resisting the summary judgment application.

First Issue — The plaintiff should first enforce the charges instead of pursuing a claim against the plaintiff

[17] The defendants argued that the plaintiff should have taken action to foreclose the charged properties first instead of suing the defendants for recovery of the outstanding indebtedness. This argument in fact was the only ground raised by the defendants at the hearing. The counsel for the defendants referred to the authority of the Federal Court in the case of *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825, in particular to the following passage from the judgment of Alauddin Mohd Sherif FCJ (as he then was):

> As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the Annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

[18] The plaintiff responded to this contention by stating in its written submissions, as well as during the hearing, the provisions of section 11.02 of the facilities agreement which entitles the plaintiff, upon default by the first defendant, to pursue any of the available remedies to recover the outstanding and enforce its rights. Section 11.02 therein is clear in providing for the same, in the following terms:

> Section 11.02 RIGHTS OF BANK ON DEFAULT
>
> (1) If a default pursuant to Section 11.01 or if any of the events stipulated in Section 11.01 hereof shall happen, the indebtedness and all other sums payable under this Agreement and other Security Documents shall (unless otherwise decided by the Bank) become and be deemed to be, notwithstanding anything contained herein to the contrary, forthwith due and payable and whereupon the Bank shall be *entitled forthwith to take action to sue and institute by way of civil suit for the recovery of indebtedness or any part or parts thereof either before, after or concurrently with the action to enforce any of the Security Documents* and to apply any credit balance standing to any account of the Borrower with any office or branch of the Bank whether in Malaysia or otherwise and in whatever currency towards satisfaction of the indebtedness ... (Emphasis added.)

[19] Although *Tan Kong Min* refers strictly to the situation where the relationship between the parties is governed by the charge annexure only, in contradistinction to the facts in the instant case, where there is also the facilities agreement with the borrower in addition to the charge annexure with the third party security provider, the principle enunciated by the Federal Court in that case that where there is a charge, any civil action may only be filed after

foreclosure of the charge is first initiated and concluded is of overarching importance that cannot be answered by merely making reference to the contractual terms.

[20] As I informed counsel at the hearing, in my view, a more complete answer to the argument of the defendants which relied on *Tan Kong Min* is the subsequent decision of the Federal Court in *Chan Boi Loi v Public Bank Bhd and another application* [2011] 1 MLJ 478; [2009] 6 CLJ 81 which made it clear that *Tan Kong Min* did not refer to the earlier Supreme Court decision of *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 which had then already established that a chargee or creditor may at its option pursue all its remedies to recover monies lent by him either simultaneously, contemporaneously or successively, unless there is agreement to the contrary.

[21] Given the heavy reliance on *Tan Kong Min* by the defendants, it would be useful to reproduce the relevant parts of the judgment of Gopal Sri Ram JCA (as he then was) in *Chan Boi Loi* which discussed *Tan Kong Min*, as follows:

> *... Before we state our views on the correctness of the ratio* in *Hong Kong & Shanghai Banking Corp v Wan Mohd bin Wan Ngah* we must discuss the other authority relied upon by counsel for the applicants. It is *Tan Kong Min v Malaysian National Insurance Sdn Bhd* [2006] 1 MLJ 601; [2005] 3 CLJ 825.
>
> [5] In that case, the respondent insurance company had lent money to the appellant who had provided security for that loan by way of a registered charge over his land. The appellant defaulted in making payment of the loan. The insurance company then instituted foreclosure proceedings and had the land sold off at a public auction. But the monies it got from the sale were insufficient to satisfy the debt owed to it. So, it commenced an action to recover the shortfall. The appellant took the point that the action was barred by limitation. His failure to comply with that demand constituted a breach of the contract contained in the annexure to the charge. More than six years had passed since that breach. The lender could not therefore recover the shortfall. These arguments were rejected by this court which held, inter alia, that the relevant period of limitation was 12 years and not six years. It then made the following observations upon which the present applicants place much reliance:
>
> > At the risk of repetition, we would reiterate that the personal liability of the appellant as chargor is in respect of the difference between the amount due under the housing loan and the amount realised from the sale of the said land only and the cause of action against the appellant is only complete upon the conclusion of the sale of the said land. Indeed, if a suit is brought against the chargor before the completion of the foreclosure action and the determination that there is a balance still owing, such a suit could be struck off as being premature.
> >
> > ...
> >
> > As is the case here, where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the

charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge. The proper mode of recovery is to proceed by way of foreclosure and if there arises any difference to the amount due after deducting the amount realised from the sale, a separate action should be taken against the chargor on his personal liability to recover the balance.

[6] In arriving at these conclusions, this court relied on the decision in *Hong Kong & Shanghai Banking Corp Ltd v Wan Mohd Wan Ngah* and the case of *Leong Yick Realty Co Sdn Bhd v Asia Commercial Finance (M) Sdn Bhd* [1994] 2 MLJ 308; [1994] 2 CLJ 530 which followed it. *However, the attention of this court was not drawn to the later decision in Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77; [1997] 2 CLJ 36 *where this court held as follows:*

> *Now, it is trite that a chargee/creditor may pursue any or all remedies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under* s 256 *of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.

[7] It is clear from the statement of facts in *Tan Kong Min v Malaysian National Insurance Sdn Bhd* that the only points in the case that called for decision were (i) when the insurance company's cause of action to recover the shortfall arose and (ii) which period of limitation was to be applied, that is, the six years prescribed by s 6 or the 12 years prescribed by s 21 of the Limitation Act 1953. *The observation 'where the respondent is also a chargee of the property and the only terms that bind the parties are the terms set out in the annexure to the charge, the respondent is not entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge' is pure obiter dicta and not part of the ratio decidendi. It is not to be treated as binding authority.* At the risk of repetition, *Tan Kong Min* was an action to recover a shortfall that had occurred after the sale of the security. It was not an action for the recovery of a debt due from the borrower to the lender. As for *Hong Kong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah*, it was clearly overtaken by the decision of this court in *Low Lee Lian v Ban Hin Lee Bank Bhd* and must be now regarded as overruled. It is of interest to note that Lamin PCA was a member of this court in *Low Lee Lian* and subscribed to a view that was at variance with that he had expressed in *Wan Mohd Wan Ngah*'s case.

[8] *We would reiterate that a lender is entitled to pursue all remedies available against a borrower simultaneously, contemporaneously or successively to recover the money lent unless there is an agreement to the contrary. Such an agreement is not to be implied from a clause in an annexure to a charge in terms of cls 8 and 16 in the present instance. All that a clause in those terms does is to create a right in the lender to recover the balance outstanding in the event that a sale of the charged property produces a shortfall. It is not an agreement by the instant respondent bank to postpone its right to bring an action in personam for the recovery of the whole sum lent (together with interest) until after the charged land has been sold. If the courts were to read such an agreement into the clauses*

in question it would amount to an unwarranted restriction on a lender's rights to seek the remedies open to it. The fallacy of the contrary argument is revealed by asking the question: what if the land can never be sold despite all attempts to do so? It would mean that the borrower would get away scot-free from making any payment because his answer to any action by the lender upon the covenant to pay would be that it is a condition precedent that the land be sold and a shortfall produced before any suit may be instituted. The want of logic in that proposition is sufficient to demonstrate that it is not common sense and certainly not the common law. (Emphasis added.)

[22] *Tan Kong Min* involves an action to recover a shortfall after conclusion of the foreclosure of the charged property. The instant case is more straightforward; where the lender is seeking to recover the debts from the borrower. But most importantly the very passage from *Tan Kong Min* relied on by the defendants has been ruled, as stated above, to be merely obiter and not to be treated as binding authority. I have also discussed these cases in *Bank Simpanan Nasional v Tham Lai Ling* [2016] 6 CLJ 880.

[23] The position in law is trite. Given, as shown above, that there is no restriction in any contractual arrangement between the parties, the plaintiff is therefore fully entitled to exercise its right to pursue its claim against the borrower/first defendant (and the other defendants as guarantors) prior to seeking to foreclose the charged properties. As such, this principal contention of the defendants is entirely unsustainable and cannot in any manner be construed as giving rise to a triable issue.

Second issue — The action against the second, third, fourth and fifth defendants is premature

[24] The defendants argued in the affidavits and the written submissions that the claim against the second, third, fourth and fifth defendants is irregular. They contended that as guarantors, the liability of the said defendants only arises after the plaintiff had exhausted all avenues to recover the alleged indebtedness against the first defendant as the borrower. Thus the present action would be premature as against the second, third, fourth and fifth defendants.

[25] This contention is clearly unmeritorious. That the plaintiff has the right to pursue its recovery against the defendants as guarantors is crystal clearly stated in the guarantee itself. Each of the second, third, fourth and fifth defendants had jointly and severally agreed to comply with the terms of the guarantee, which is plainly stated to be in the nature of a 'continuing guarantee' where any additions or variations concerning the underlying facilities would not affect their guarantee towards payment of the entire facilities. Section 2.04 of the guarantee provides thus:

Section 2.04 GUARANTEE IN ADDITION TO

This Guarantee is in addition to and not in substitution for and shall not in any way be prejudiced or affected by any other security whether negotiable or otherwise including any other guarantee or indemnity whether which the Bank may now or at any time hereafter hold from the Guarantor, the Borrower or any other person for all or any part of the Guaranteed Amounts nor shall security or any other security to which the Bank may otherwise be entitled or the liability of any person not a party hereto for all or any part of the Guaranteed Amounts be in any way prejudiced or affected by this Guarantee.

[26] The said defendants, as guarantors had also agreed to make payments to the plaintiff any sum outstanding from the first defendant borrower, whenever demanded of them by the plaintiff. More pertinently, the guarantors are deemed by section 2.03 of the guarantee as principal debtors which further makes the ability of the plaintiff to take action against the second, third, fourth and fifth defendants, as guarantors, to be more manifest. Section 2.03 states as follows:

Section 2.03 LIABILITY AS PRINCIPAL DEBTOR

The Guarantor hereby agrees that as between the Guarantor and the Bank, the Guarantor shall be a principal debtor and all sums of money which may not be recoverable from the Guarantor on the footing of a guarantee, whether by reason of any legal limitation, disability or incapacity on or of the Borrower or any other fact or circumstances, including without limitation, where the Borrower being a limited company, may have exceeded its borrowing power or that the borrowing from the bank may have been ultra vires and whether known to the Bank or not or the want of authority by any person purporting to act on behalf of the Borrower, shall nevertheless be recoverable on demand from the Guarantor as the sole and principal debtor.

[27] This is also consistent with the rule that a creditor has the right to commence bankruptcy proceedings against the guarantors separately or simultaneously with its enforcement of other security arrangement. It is not for the defendants (borrower or guarantor), to dictate which remedy the creditor should pursue first. As established by the Supreme Court in *Bank Bumiputra Malaysia Bhd v Esah binti Abdul Ghani* [1986] 1 MLJ 16; [1985] CLJ Rep 41, a guarantor (other than a social guarantor) has no special right to demand that the creditor go against the principal debtor first to pay off the debt before asking the guarantor to pay.

[28] It is also rudimentary that the nature of the guarantee executed by the defendant guarantors means that the plaintiff has the unbridled right to proceed to recover the full outstanding sum from any one of the guarantors, or from any or all of them in various sums until the judgment is paid in full.

[29] Accordingly, this contention of the defendants is clearly misconceived and thus cannot validly constitute a triable issue.

Third issue — The plaintiff wrongly demanded payment of two different amount

[30] It is true that the plaintiff had demanded payment of the outstanding sum of different amounts. But this plainly refers to the amount outstanding as computed by reference to a particular date. As there was non-payment by that earlier on the first mentioned date, a fresh demand would necessarily and logically specify the latest amount still due by reference to a subsequent date. Thus the sum demanded in the letter of 15 January 2016 of RM736,971.82 was the outstanding amount as at 14 January 2016, and the subsequent demand of 4 April 2016 was for the outstanding amount of RM756,047.02 as at 31 March 2016. There is absolutely no ambiguity here, not least to men of business such as the borrowers and the guarantors in the instant case.

[31] Furthermore, the matter was put to rest when the plaintiff issued the certificate of indebtedness to the first defendant on 3 June 2016, repeating the outstanding amount of RM756,047.02 as at 31 March 2016. The effects of the certificate of indebtedness is spelt out in the facilities agreement, the charges and the guarantees. Relevant parts of the clauses in these documents state the following:

Section 12.12 of the Facilities Agreement

> It is hereby agreed that any admission or acknowledgment...or a certificate or a statement of account in writing showing the Indebtedness of the Borrower, or any Security Party, which is duly certified by an authorised officer of the Bank shall be binding and conclusive evidence against the Borrower for whatever purpose including as being conclusive evidence of the indebtedness in a court of law.

Section 9.17 of the Charge Annexure

> It is hereby agreed that any admission or acknowledgment...or a certificate or a statement of account in writing showing the Indebtedness of the Borrower, or the Chargor or any Security Party, which is duly certified by an authorised officer of the Chargee shall be binding and conclusive evidence against the Chargor for whatever purpose including as being conclusive evidence of the indebtedness in a court of law.

Section 10.02 of the Guarantees

> Any admission.....or any statement of account furnished by the Bank which is duly certified by an authorised officer or agent of the Bank or computer generated notices which do not require signatures issued by the Bank, shall be binding on and conclusive evidence against the Guarantor for whatever purpose

including as being conclusive evidence of the Guaranteed Amounts is a court of law, save for manifest error.

[32] In *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685, the Federal Court reversed the Court of Appeal's decision requiring the plaintiff to tender further proof of the defendant's indebtedness and held that when a conclusive certificate of indebtedness is issued, such a certificate shifts the burden onto the defendant to disprove the claim. It was further held as follows:

> [11] The above dictum establishes firmly the conclusive nature and extent of a certificate of indebtedness. A certificate of indebtedness operates in the field of adjectival law. It excuses the plaintiff from adducing proof of debt. Such a certificate shifts the burden onto the defendant to disprove the amount claim.
>
> ...
>
> [13] The certificate of indebtedness, exh P3, issued in accordance with cll 27 and 7.03 aforesaid, are lucid enough. There is nothing to indicate or suggest any manifest error on the face of the said certificate nor is any fraud shown. In the circumstances and given the authorities cited, we take the firm view that the answer to the first question must be in the affirmative whereas the second question has to be answered in the negative. Having considered the questions in the context of the established facts, it is appropriate, we think, to allow this appeal with costs ...

[33] In the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 the former Federal Court ruled that the guarantors were bound under the contract of guarantee to accept the certificate of indebtedness duly executed by the vice president of the bank as conclusive evidence of the debt due to the bank, thus entitling the bank to summary judgment.

[34] In the instant case, none of the defendants was able to demonstrate any manifest error in the certificates of indebtedness. Neither could any of the defendants proffer any justifications that could disprove the conclusive nature of the same. This ground is thus entirely unsustainable and devoid of merit. There is no triable issue in this contention.

ADDITIONAL OBSERVATIONS

[35] When viewed in totality, the averments and arguments raised by the first defendant are considerably inflicted by various shortcomings that do little, if at all, to advance its resistance to this summary judgment application.

[36] Above all, the case of the defendants is also riddled with averments which are not substantiated. These are bare averments without real support. No documents were produced by the first defendant to corroborate its stance on

virtually all the arguments to challenge this summary judgment application. It is trite that mere bare denials or assertions do not constitute evidence and they cannot give rise to triable issues (see the Court of Appeal decision in *Chen Heng Ping & Ors v Intradagang Merchant Bankers (M) Bhd* [1995] 2 MLJ 363).

[37] Reference should also be made to the leading judgment of the former Supreme Court on summary judgment application in *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 which held as follows:

> Under an O 14 application, the duty of a judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a judge is in no position to exercise his discretion judicially under an O 14 application. Thus, apart from identifying the issues of fact or law, the court must go one step further and determine whether they are triable. This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

[38] Having evaluated the facts and law arising from this instant case, I have, in the foregoing, determined that the defendants have so plainly failed to raise any triable issue or reasonable defense. I additionally find that all the arguments raised by the first defendant to be entirely at variance from and not consistent with either the clear position in law or the undisputed contemporary documents, being the various agreements governing the overdraft and letters of credit facilities. The resistence of the defendants is futile and must therefore fail.

CONCLUSION

[39] For the reasons that I have discussed in the foregoing, I find that the defendants have fallen very considerably short, and not succeeded, on a balance of probablilities, in demonstrating that they had any triable issue to resist the plaintiff's summary judgment application.

[40] Accordingly, I allow encl 5 and grant the O 14 summary judgment for the plaintiff, with costs.

Enclosure 5 allowed with costs.

Reported by Dzulqarnain Ab Fatar